Mohamad Hanifa bin Mohamed Yusoof (acting as Presiden Kongres Indian Muslim Malaysia (KIMMA)) v Sikandar Batcha bin Abdul Majeed

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–24–79 OF 2000
ABDUL AZIZ J
12 JUNE 2002

Bankruptcy — Adjudication order — Annulment — Adjudication and receiving orders against defendant annulled before plaintiff filed originating summons — Annulment of bankruptcy sought on the grounds that defendant's debts were paid in full — Whether the annulment of adjudication of bankruptcy has retrospective effect — Debts of bankrupt paid in full — Bankruptcy Act 1967 s 105(2)

The defendant, in an originating summons applied by the plaintiff, was ordered to refrain himself from holding out as the President of Pertubuhan Kongres Indian Muslim Malaysia ('KIMMA') from the session 2000–2002. Based on the plaintiff's affidavit, the defendant was an undischarged bankrupt and cannot be an office bearer. This is an application by the defendant for a stay of the order pending his appeal. He had produced evidence that before the plaintiff filed his originating summons, the adjudication and receiving orders made against him had been annulled on the grounds that his debts were paid in full. The issue for the court to determine was whether the annulment of bankruptcy had a retrospective effect and if so, then stay should be granted and the defendant has to be treated as not being disqualified from being an office bearer under s 9A(1)(d) of the Societies Act 1966 and art 17(6) of KIMMA's Constitution.

Held, granting the plaintiff a stay:

(1) Annulment of adjudication is dealt with in s 105(1) and (2) of the Bankruptcy Act 1967 ('the Act'). According to sub-s (1), there are three grounds upon which adjudication may be annulled. If any of the grounds is shown, the court may exercise its discretion to annul the adjudication, and where adjudication is annulled on any of those grounds, the effect of the annulment must be the same as that of annulment on any of the other grounds (see p 167D, G–H).

(2) The effect of an annulment of an adjudication of bankruptcy is to 'wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication' per Sterling LJ in *In re Keet* [1905] 2 KB 666. Those words could only mean that the effect of annulment is retrospective (see pp 167H–I, 168C).

(3) If an annulment is on the first of the three grounds in sub-s (1) of s 105 of the Act would have retrospective effect, the effect has to be the same if an annulment, as in this case, is on the second ground of full payment of debts. If the effect is to be different, full payment of debts would not have been made an equally good

A ground for annulment as the first ground. The court held, therefore, that an annulment of adjudication of bankruptcy has retrospective effect, but subject of course to sub-s (2) of s 105 of the Act (see p 168E–F).

B **[Bahasa Malaysia summary**

Defendan, dalam satu saman pemula yang dipohon oleh plaintif, telah diperintah supaya menahan diri dari mengemukakan dirinya sebagai Presiden Pertubuhan Kongres Indian Muslim Malaysia ('KIMMA') dari sessi 2000–2002. Berdasarkan afidavit plaintif, defendan adalah C seorang bankrap yang belum dilepaskan dan tidak boleh menjadi penyandang jawatan. Ini adalah satu permohonan oleh defendan untuk satu penggantungan perintah tersebut sementara menantikan rayuan beliau. Beliau telah mengemukakan keterangan bahawa sebelum plaintif memfailkan saman pemula beliau, perintah adjudikasi dan penerimaan yang dibuat terhadap beliau telah D dibatalkan atas alasan bahawa hutang belian telah dibayar sepenuhnya. Isu untuk diputuskan oleh mahkamah adalah sama ada pembatalan kebankrapan mempunyai kesan kebelakangan dan jika sedemikian, maka penggantungan haruslah diberikan dan defendan haruslah dilayan sebagai layak untuk menjadi penyandang jawatan di bawah s 9A(1)(d) Akta Kesatuan 1966 dan per 17(6) Perlembagaan E KIMMA.

Diputuskan, memberikan plaintif satu penggantungan:

(1) Pembatalan adjudikasi diuruskan dalam s 105(1) dan (2) Akta F Kebankrapan 1967 ('Akta tersebut'). Menurut sub-s (1), terdapat tiga alasan di atas yang mana adjudikasi boleh dibatalkan. Jika mana-mana daripada alasan-alasan itu ditunjuk, mahkamah boleh melaksanakan budibicaranya untuk membatalkan adjudikasi tersebut, dan di mana adjudikasi dibatalkan atas mana-mana daripada alasan-alasan itu, kesan pembatalan tersebut G semestinya sama seperti pembatalan mana-mana alasan lain (lihat ms 167D, G–H).

(2) Kesan sesuatu pembatalan adjudikasi kebankrapan adalah untuk 'wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication' oleh Sterling H LJ di dalam *In re Keet* [1905] 2 KB 666 . Perkataan-perkataan ini hanya bermaksud bahawa kesan pembatalan adalah bersifat kebekalangan (lihat ms 167H–I, 168C).

(3) Jika sesuatu pembatalan adalah pada yang pertama daripada tiga alasan di dalam sub-s (1) dari s 105 Akta tersebut akan mempunyai kesan kebelakangan, kesannya haruslah sama jika I sesuatu pembatalan, sepertimana dalam kes ini, adalah atas alasan kedua berhubung pembayaran hutang sepenuhnya. Jika kesannya berlainan, pembayaran sepenuhnya hutang tidak akan dijadikan

alasan yang sama baik untuk pembatalan sepertimana alasan pertama. Mahkamah oleh itu memutuskan, bahawa pembatalan adjudikasi kebankrapan mempunyai kesan kebelakang, tetapi tentunya tertakluk kepada sub-s (2) dari s 105 Akta tersebut (lihat ms 168E–F).]

Notes

For cases on annulment of adjudication order, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1585–590.

Cases referred to

Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd [1996] 4 MLJ 271 (refd)

Dato' Haji Mohd Muslim bin Othman v Shuaib bin Lazim & Anor [1993] 2 CLJ 177 (refd)

Keet, In re [1905] 2 KB 666 (refd)

Kwong Yik Bank Bhd v Hah Chiew Yin Yin [1985] 2 MLJ 452 (refd)

Legislation referred to

Bankruptcy Act 1967 s 105

Societies Act 1966 s 9A(1)(d)

Ganesan Karuppannan (*Ganesan K & Assoc*) for the plaintiff.

Anandan P Thatchanamoorthy (*Nazrin Nasir T Anand & Co*) for the defendant.

Abdul Aziz J: On 31 July 2001, on the plaintiff's application by the originating summons in this case, I ordered the defendant to hand over to the plaintiff the records and documents of the Pertubuhan Kongres Indian Muslim Malaysia ('KIMMA') and to refrain from holding himself out as the President of KIMMA for the session of 2000–2002. The defendant had not responded to the originating summons and was absent when it was heard although there was evidence that he had been served. It appeared to me from the plaintiffs affidavit that the defendant was not the lawful President of KIMMA because he was an undischarged bankrupt, having been adjudged a bankrupt on 6 November 1997, and according to s 9A(1)(d) of the Societies Act 1966 and art 17(6) of KIMMA's Constitution, an undischarged bankrupt cannot be an office bearer. It appeared from the plaintiff's affidavit that the defendant currently claimed himself to be the President of KIMMA by virtue of an election on 11 August 2000.

This is an application by the defendant for a stay of the orders of 31 July 2001 pending his appeal to the Court of Appeal. For this application, the defendant has produced evidence that on 24 November 2000, before the plaintiff filed his originating summons, the adjudication and receiving orders made against him on 6 November 1997 had been annulled. The defendant had sought annulment on the grounds that his debts were paid in full, and I take it that the annulment was on those grounds.

A At the commencement of submission on this application, learned counsel for the plaintiff conceded that if the annulment of bankruptcy had retrospective effect, stay should be granted, and he asked that that question of law be addressed first. If an annulment of bankruptcy has retrospective effect, the defendant has to be treated as not being disqualified under s 9A(1)(d) of the Societies Act 1966 and art 17(6) of KIMMA's B Constitution from being an office bearer when he was elected President on 11 August 2000.

In *Dato' Haji Mohd Muslim bin Othman v Shuaib bin Lazim & Anor* [1993] 2 CLJ 177, Malek Ahmad J (now FCJ) held in effect that the annulment of the adjudication order in that case had retrospective effect. C On the other hand, Abdul Kadir Sulaiman J (now JCA), in *Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271, ruled, at p 278D–E, that the annulment of adjudication of the first plaintiff in that case would not render competent the action that he brought during the period of his incapacity.

D Annulment of adjudication is dealt with in s 105 of the Bankruptcy Act 1967 ('the Act'). Sub-ss (1) and (2) provide as follows:

> (1) Wherein the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the E court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.
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> (2) Where an adjudication is annulled under this section, all sales and F dispositions of property, and payments duly made, and all acts thereto for done by the official assignee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as G the court declares by order.

According to sub-s (1), there are three grounds upon which adjudication may be annulled: (a) the debtor ought not to have been adjudged bankrupt; (b) the debts of the bankrupt are paid in full; and (c) the distribution of the bankrupt's estate and effects ought to take place in Singapore. If any of the H grounds is shown, the court may exercise its discretion to annul the adjudication, and where adjudication is annulled on any of those grounds, the effect of the annulment must be the same as that of annulment on any of the other grounds.

As the word 'annul' itself signifies, the effect of an annulment of an I adjudication of bankruptcy is, as Stirling LJ said in *In re Keet* [1905] 2 KB 666, at p 676, to 'wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication'.

In re Keet was not concerned with the question whether annulment of bankruptcy has retrospective effect. It was concerned with the question whether 'the debts of the bankrupt are paid in full' for the purposes of s 35 of the Bankruptcy Act 1883, which provided that 'where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court, may, on the application of any person interested, by order, annul the adjudication'. But Sterling LJ said those words to distinguish annulment from an order of discharge and to emphasize that, such being the effect of an annulment, where a bankrupt applies for annulment on the grounds of having paid his debts in full, the court must be satisfied that he has paid his debts in full as intended by the section and that the court ought, in the circumstances, to exercise its discretion to annul the adjudication.

I have no doubt that Sterling LJ's words correctly express the effect of annulment. The Federal Court adopted those words in *Kwong Yik Bank Bhd v Hah Chiew Yin Yin* [1985] 2 MLJ 452 at pp 452–453. The words could only mean that the effect of annulment is retrospective. To say of the defendant that notwithstanding the annulment, he must nonetheless be treated as disqualified by bankruptcy on 11 August 2000 from being elected President of KIMMA would be not to 'wipe out the bankruptcy altogether' and not to put him 'in the same position as if there had been no adjudication'.

Furthermore, I have no doubt — as learned counsel for the plaintiff himself conceded — that if an annulment is on the first of the three grounds in sub-s (1) of s 105 of the Act, that is, that the debtor 'ought not to have been adjudged bankrupt', the annulment would have retrospective effect. As I said, the effect has to be the same if an annulment, as in this case, is on the second ground of full payment of debts. If the effect is to be different, full payment of debts would not have been made an equally good ground for annulment as the first ground.

I hold, therefore, that an annulment of adjudication of bankruptcy has retrospective effect, but subject of course to sub-s (2) of s 105 of the Act.

I allow a stay.

Stay allowed.

Reported by Ezatul Zuria Azhari